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October 4, 2013

Catherine O'Hagan Wolfe
Clerk, U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *SEC* v. *Contorinis*, No. 12-1723-cv (2d Cir.)

Dear Ms. Wolfe:

We represent defendant-appellant Joseph Contorinis in the above-captioned appeal, which is scheduled to be argued on Monday, October 7, 2013. On September 30, 2013, the United States Securities and Exchange Commission (the "Commission") submitted a letter to the Court ("SEC Ltr.") arguing that Mr. Contorinis's discussion of *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) ("*Grupo*"), is "not properly before the court," and that the case is otherwise not instructive here. We respectfully disagree.

Mr. Contorinis has consistently asserted, both in the district court and on appeal, that any order of disgorgement that goes beyond the amount of money acquired by Mr. Contorinis exceeds the permissible scope of the equitable remedy of disgorgement. (*See, e.g.*, Def.'s Mem. of Law in Opp'n to the SEC's Mot. for Summ. J., No. 09 Civ. 1043 (RJS) (S.D.N.Y.), Dkt. No. 147, at 7, 9–10.) In his opening brief on this appeal, Mr. Contorinis specifically argued that any such disgorgement was "beyond the court's equitable powers." (Br. at 15 (internal quotation marks omitted and citing, among others, *SEC* v. *Cavanagh*, 445 F.3d 105, 116, 177 n.25 (2d Cir. 2006)); *see also id.* ("It necessarily follows that a defendant must have actually received the sums in

question for the court *to be able to exercise its equitable powers* in ordering such sums to be disgorged." (emphasis added)).) And in his reply brief, Mr. Contorinis reiterated that "the disgorgement ordered in this case exceeded the district court's authority by going beyond what was required to return Mr. Contorinis to the position he was in before the alleged violation occurred." (Reply at 2; *see also id.* at 3 (stating that the purpose of disgorgement is "to return a defendant to the status quo that existed prior to any wrongdoing, thus preventing unjust enrichment"); *id.* at 4 ("Courts have widely held that in order to constitute a defendant's unjust or ill-gotten gains subject to disgorgement, those gains must have been received by the defendant.").)

Mr. Contorinis's citation to *Grupo* is just further support for the argument that the disgorgement ordered by the district court in this case is inconsistent with the permissible contours and fundamental purpose of the equitable remedy of disgorgement. (*See id.* at 15–16 (citing *Grupo*, 527 U.S. at 318, 319, 329); *id.* at 15 ("disgorgement has traditionally been limited to a defendant's own ill-gotten gains, or those acquired by a tippee working in concert with the defendant").) The court's equity jurisdiction should not be expanded "to allow for the redemption of profits never received, enjoyed, or controlled by the defendant," (*id.* at 16), as the district court did here when it ordered Mr. Contorinis to disgorge amounts that went to an innocent third party (*i.e.*, the Fund).[1] Requiring Mr. Contorinis to disgorge the Fund's profits—an amount that vastly exceeds his own ill-gotten gains—would result in a penalty, placing the ordered disgorgement outside the court's equity jurisdiction. (*See, e.g.*, Br. at 15 ("[A]wards that exceed the defendant's gains are punitive and[, therefore,] beyond the court's equitable powers." (internal quotation marks omitted)); Reply at 6 ("disgorgement must be limited to a defendant's own gain to avoid having forfeiture's punitive attributes").)

Respectfully submitted,

Roberto Finzi

cc: All counsel of record via ECF

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[1] Neither the Commission, the U.S. Attorney's Office, nor anyone else has ever alleged that Mr. Contorinis was a tipper; there are no tippees' ill-gotten gains to consider here. (*See* Br. at 19; Reply at 11–14.)